

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE
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PUBLIC SERVICE COMMISSION

JOHN F. O'MARA
Chairman



SEP 16 1997

JOHN C. CRARY
Secretary

September 15, 1997

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 10554

RE: CC Docket No. 94-129: Implementation of the Subscriber
Carrier Selection Provisions of the Telecommunications
Act of 1996; Policies and Rules Concerning Unauthorized
Changes in Consumers' Long Distance Carriers.

Dear Secretary Caton:

Enclosed for filing please find an original and eleven
(11) copies of the comments of the New York State Department of
Public Service in the above-captioned matter.

A copy of the comments and is being provided to Ms.
Cathy Seidel of the Common Carrier Bureau and to the Commission's
document contractor, ITS. Also enclosed is a copy of our
comments on diskette in "read only" format.

Thank you.

Sincerely,

Lawrence G. Malone *pro*

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Consumers' Long Distance)
Carriers)

CC Docket No. 94-129

COMMENTS OF THE
NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE

Dated: September 15, 1997
Albany, New York

**Before the
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INTRODUCTION AND SUMMARY

The New York State Department of Public Service (NYDPS) submits these comments in response to the Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration (Notice) released on July 15, 1997. In the Notice, the Commission requests comment on a proposal to modify its rules concerning unauthorized changes of consumers' telecommunications carriers, or "slamming," to implement Section 258 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act). The Commission seeks comment on its tentative conclusion that the consumer protection and competitive goals and policies underlying the Commission's 1995 Report and Order apply with equal force to all telecommunications carriers within the meaning of the Act.

Specifically, the Commission seeks comment on the applicability of the verification rules contained in Sections

64.1100 and 64.1150 to all telecommunications carriers and whether these rules should apply when carriers solicit subscribers regarding preferred carrier (PC) freezes. In addition, the Commission seeks comment on whether the "welcome package" described in Section 64.1100(d) continues to be a viable carrier change verification alternative. The Notice also seeks comment on whether in-bound calls should be exempt from the Commission's verification rules. In light of the Act's new provisions, the Commission seeks comment regarding subscriber-to-carrier liability and carrier-to-subscriber liability. Finally, the Commission asks for comment regarding the evidentiary standard for determining whether a subscriber has relied on a resale carrier's identification of its underlying facilities-based network provider.

The NYDPS supports the Commission's intent to vigorously address slamming. In summary, NYDPS makes the following comments:

1. The verification rules should apply to all telecommunications carriers.
2. The Welcome Package Verification option should be eliminated or, in the alternative, if a Welcome Package Verification is permitted, the Letter of Authorization (LOA) should include a positive checkoff, rather than the negative checkoff that currently exists.
3. Inbound, or customer-initiated, calls should be subject to the carrier change verification rules.

4. Verification procedures for PC-freezes and PC-"thaws" should match the PC-change verification procedures; and all telecommunications carriers should be required to offer, at no cost, freeze options to end-users. A change in local exchange carrier should not require any action by the subscriber to continue the freeze on other services.

5. Consumers should have the right to refuse to pay charges assessed by unauthorized carriers.

6. Customers should be absolved of liability for any charges assessed by unauthorized carriers for 90 days after notice that the customer has been slammed and for charges in excess of the charges that would have been assessed by the authorized carrier for the previous 90 days. In the alternative, the subscriber should pay no more than it would have paid if the slamming had not occurred.

7. The Commission should establish the presumption that subscribers relied on representations that a specific carrier would be the underlying carrier in subscribing to service from a resale carrier.

I. Application of the Verification Rules to All Telecommunications Carriers

One method of verification allowed for in the Commission's proposed rules, at section 64.1100(c), provides for independent third party verification.¹

¹ We recommend that the term "independent" be defined to preclude a company or other telecommunications carrier that is affiliated with the telecommunications carrier submitting the PC change. For example, if an incumbent local exchange carrier's

The Act applies the prohibition against slamming to any telecommunications carrier either submitting or executing a change in a subscriber's selection of a telecommunications service provider. The Commission's proposed definitions of "executing" and "submitting" carriers are broad, and this broadness should serve the purpose of encompassing all parties able to prevent slamming.

The NYDPS agrees with the Commission that executing telecommunication carriers may rely on the representation by the submitting carrier of a subscriber's authorization and should not be required to independently verify such authorization. With respect to other consumer protections, we recommend that records verifying PC changes be maintained for a minimum of nine months.

The Commission seeks comment on whether incumbent LECs should be subject to different requirements and prohibitions because of any advantages that their incumbency gives them compared to carriers that are seeking to enter local exchange markets. The NYDPS recommends that incumbent LECs not be subject to different requirements and prohibitions with respect to PC changes solely by virtue of their incumbent status. All carriers should be treated equally and afforded no advantage due to their particular role in the processing of PC change requests.

(LEC) parent corporation establishes a competing LEC (e.g., similar to Rochester Telephone Corp.'s experience in New York), it should be made clear that the two affiliated LECs cannot serve as independent third parties for one another to satisfy section 64.1100(c).

Nonetheless, without regard to a particular type of telephone service, circumstances may arise in which, solely because of a telecommunications carrier's role in processing a change request, it acquires information not available to its competitors, which creates an opportunity for unfair, anti-competitive advantage. Accordingly, the NYDPS recommends the Commission prohibit any carrier (whether a LEC or not) from using that information in any way that gives it market advantage until other carriers have notice of the information and have the same opportunity for its use.

The Commission also seeks comment on whether an incumbent LEC may send a promotional letter to a subscriber in an attempt to change the subscriber's decision to switch to another carrier. The Commission questioned whether such a letter would violate the Commission's verification rule prohibiting LOAs combined with inducements on the same document and whether such a practice would be otherwise inconsistent with the Act's consumer protection and pro-competition goals.

A promotional letter, or any other form of communication between a carrier and a subscriber who has indicated an intent to leave the carrier's service, that goes beyond verifying a change in service and includes inducements, and which is prompted or made possible only because of information the carrier has obtained in its role as executing carrier (or order taker), should be impermissible. Such a communication appears inconsistent with the Act's consumer

protection and pro-competition goals, even if it does not violate the verification rules.

II. Viability of the "Welcome Package" Verification Option

Section 64.1100(d) provides for the use of a "welcome package" verification option. The proposed regulations do not modify this option, but the Commission seeks comment on its tentative conclusion to eliminate this verification option. The NYDPS agrees with the National Association of Attorneys General that the welcome package option should be eliminated, since it operates the same way as a negative-option LOA, which is inconsistent with the goal of protecting consumers from slamming. A verification option that relies on the absence of proof of a subscriber's choice as proof of the subscriber's choice is not a viable method of verifying a subscriber's choice.

Although theoretically a welcome package is sent only upon a subscriber's oral consent to switch telecommunications providers, the experience of the NYDPS demonstrates that such consent is not always obtained. Our review of complaints has shown that, even where consent appears to have been obtained, consumers may have been confused with the phrasing of telemarketing solicitations, and/or the individual on the phone may not be the responsible billing party, so any consent given may not have been authoritative.²

² In the event a welcome package verification option is permitted, the verification should be changed from a negative-option LOA to a positive-option LOA. The rules should require that the PC-change request cannot be processed until the pre-paid post card is returned with a confirmation of the request to

III. Application of the Verification Rules to In-Bound Calls

The NYDPS agrees with the Commission's proposal that in-bound or customer-initiated calls require verification, just as other PC change alternatives. At a minimum, the verification requirement could be satisfied by requiring carriers to maintain the same verification data required under section 64.1100(c) for every in-bound call.

IV. Verification and Preferred Carrier Freezes

The Commission seeks comment on whether its PC-change verification procedures should be extended to PC-freeze solicitations. The NYDPS recommends that verification procedures for PC-freezes and "PC-thaws" should match the PC-change verification requirements. We believe the ability to freeze a customer's service provider has been an appropriate consumer safeguard in the intraLATA and interLATA markets. Indeed, a PC-freeze has been the only slamming prevention protection available to consumers. We also recommend that the Commission adopt a rule limiting the authority to request (and thaw) a PC-freeze to only the "subscriber," as that term is defined and used by the Commission.

PC freezes do not prevent a customer from choosing a carrier, but only provide protection from unscrupulous carriers. Contrary to the position advanced by some, a PC-freeze allows choice in providers and protects customers -- it may affect only how quickly the choice is implemented. To ban PC-freezes for the

change.

minimal delay they may cause under the guise of preserving choice of providers would be to eliminate consumers' only slamming prevention mechanism at this time.

We recommend that all telecommunications carriers be required to offer, at no cost, freeze options to their subscribers, as defined by the Commission. We recommend this policy with the intent that it would make PC-freezes effective against slamming wherever possible in the chain of carriers providing service to the subscriber. In the State of New York, a significant number of slamming complaints have arisen as a result of slamming activity by "switchless resellers." Slamming by unscrupulous switchless resellers creates an especially troublesome situation, because the current PC-freeze is effective only at the link between the facilities of a LEC and an IXC. It does not protect against slamming in the situation where the LEC is not involved in processing the PC-change request. For example, two switchless resellers, Square Company and Circle Company, may be reselling underlying carrier ABC Corp.'s service. The PC freeze, between ABC Corp. and the LEC, would be ineffective at blocking an unauthorized change request submitted by Square Company to ABC Corp. for a subscriber of Circle Company.

In seeking comment on what practices would promote both competition and consumer protection, the Commission asks whether a subscriber, who has frozen IXC service, must request another PC-freeze upon switching LECs, or whether the new LEC must

automatically establish the same PC-freeze on the subscriber's IXC service. The NYDPS recommends that the new LEC automatically establish any pre-existing PC-freezes on the subscriber's service. We believe this requirement would promote both competition and consumer protection. The decision to change one carrier's telecommunications service should not require the customer to take any action to preserve the customer's choices with respect to other carriers' telecommunications services or impact any features of the consumer's other telephone service options.

On a related issue, we recommend that data verifying PC-freeze requests be maintained as long as the subscriber remains a customer of the carrier. Such a requirement is necessary because the issue of whether or not a PC freeze was actually requested by a subscriber does not arise until the subscriber seeks to change service, which could be at any point in the future.

V. Liability of Subscribers to Carriers

The Act removes the economic incentive for carriers to slam by not allowing the unauthorized carrier to keep any revenues gained through slamming. The proposed regulation limits the amount the unauthorized carrier must pay the authorized carrier to the amount actually "collected from" or "paid by" a subscriber. The Commission seeks comment on whether slammed consumers should have the option of refusing to pay charges assessed by an unauthorized carrier and on the impact on properly

authorized carriers if slammed subscribers are absolved of liability for unpaid charges. The NYDPS recommends that the two issues be considered separately.

The NYDPS recommends that consumers have the right to refuse to pay any charges assessed by the unauthorized carrier. To require otherwise could create the unintended situation in which the subscriber pays charges to the unauthorized carrier, who then vanishes or seeks protection from the bankruptcy courts, without paying over the funds to the authorized carrier. The unauthorized carrier should not be custodian of funds to which it has no right. Should a consumer be required to pay any charges, all monies should be required to be sent to the authorized carrier only.

VI. Liability of Carriers to Subscribers

The Notice asks for comment on the duties and obligations of both the unauthorized carrier and the properly authorized carrier with regard to making the customer whole. The NYDPS recommends that, for a period of 90 days after notice of a change in service provider has been indicated on the customer's first telephone bill after the carrier change was made, subscribers be absolved of liability for all charges assessed by an unauthorized carrier. In addition, we recommend that from the 91st day through the 180th day, the customer be reimbursed for any difference between rates of the unauthorized provider of telephone service and the rates charged by the authorized provider. Reimbursement should be made by the authorized

carrier, who shall have been paid by the unauthorized carrier any funds collected from the subscriber pursuant to the Act and regulations. This provision is appropriate because the authorized carrier has not incurred costs related to slammed calls, while the subscriber has been inconvenienced and, potentially, has gone to considerable effort to correct the unauthorized conversions.

In the alternative, if the Commission decides not to absolve the subscriber of all charges, even during the first 90 days, the NYDPS recommends that, at a minimum, the authorized carrier be required to refund to subscribers all charges paid and collected that exceed the authorized carrier's rates for the subscriber's calling plan. The authorized carrier should not be allowed to keep any subscriber revenues beyond what the authorized carrier would have collected in telephone charges had the subscriber not been slammed. We also agree with the Commission's proposal to require the authorized carrier to reimburse the subscriber for any other premiums to which the subscriber would have been entitled if the subscriber had not been slammed.

Finally, although neither the Act nor the proposed regulations provide a limit on the period of time an unauthorized carrier must reimburse the original carrier, given our recommendations with respect to liability to subscribers, we suggest that liability of the unauthorized carrier to the

authorized carrier be limited to six months of charges and premiums.

VII. Dispute Resolution

The Notice proposes that responsibility to resolve all carrier-to-carrier slamming liability disputes rests with the Commission. We seek clarification on the Commission's intent that it should resolve carrier-to-carrier slamming liability disputes (if private negotiations fail). We believe that state commissions have authority and responsibility to resolve carrier-to-carrier disputes related to local exchange and intrastate service. From a practical standpoint, this enforcement role (especially with respect to LECs) is best left to state commissions.³

VIII. Evidentiary Standard Related to Lawfulness of a Resale Carrier's Change in Underlying Network Provider

The Commission seeks comment on the parameters of a bright-line test to determine whether a consumer has relied on a resale carrier's identification of a particular underlying carrier, which may affect notice requirements when a reseller changes its underlying carriers. The NYDPS recommends that any test established by the Commission should presume reliance by the subscriber on the specific underlying carrier mentioned by a resale carrier in any marketing or promotional materials, including oral representations. We further recommend that such reliance should be presumed, regardless of the timing of any

³ New York will continue to aggressively enforce prohibitions on intrastate slamming.

customer correspondence made prior to the change in the underlying carrier.

The only reason an underlying carrier would be mentioned in marketing or promotional material is because the underlying carrier's name or service adds value to the service offered by the reseller and helps persuade subscribers to choose the particular reseller's service. To allow any other standard of reliance would be to ignore the presumption of value that caused the underlying carrier's name to be mentioned in the first place.

Respectfully submitted,

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Dated: September 15, 1997
Albany, New York

CC Docket No. 94-129


In the Matter of

Implementation of the Subscriber Carrier
Selection Provisions of the
Telecommunications Act of 1996; Policies
and Rules Concerning Unauthorized
Changes in Consumers' Long Distance
Carriers

Comments of New York State
Department of Public Service

CERTIFICATE OF SERVICE

I, Penny Rubin, hereby certify that an original and eleven (11) copies of comments in the above-captioned proceeding were hand-delivered to William Caton, Acting Secretary to the Federal Communications Commission. In addition, copies were sent by First Class Mail, postage prepaid, to all parties on the attached service list.



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